

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DARRYL E. BROWN,)
Plaintiff(s),) No. C 08-4885 CRB (PR)
v.) ORDER OF SERVICE
JAMES TILTON, et al.,) (Doc # 4)
Defendant(s).)

Plaintiff, a prisoner at California State Prison, Corcoran, has filed a pro se civil rights complaint under 42 U.S.C. § 1983 alleging that on December 14, 2006, while he was at Salinas Valley State Prison (SVSP), he was repeatedly assaulted by correctional officers D. Beatty, B Chavez, E. Hernandez and J. Ruiz at "the behest" of Sergeant J. Mensing. Plaintiff specifically alleges that he was "punched," "kicked" and "dragged and slammed on the floor."

Plaintiff seeks damages and appointment of counsel.

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable

1 claims or dismiss the complaint, or any portion of the complaint, if the complaint
2 "is frivolous, malicious, or fails to state a claim upon which relief may be
3 granted," or "seeks monetary relief from a defendant who is immune from such
4 relief." Id. § 1915A(b). Pro se pleadings must be liberally construed, however.
5 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

6 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two
7 essential elements: (1) that a right secured by the Constitution or laws of the
8 United States was violated, and (2) that the alleged violation was committed by a
9 person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48
10 (1988).

11 B. Legal Claims

12 Whenever prison officials stand accused of using excessive force in
13 violation of the Eighth Amendment, the core judicial inquiry is whether force
14 was applied in a good-faith effort to maintain or restore discipline, or maliciously
15 and sadistically to cause harm. Hudson v. McMillian, 503 U.S. 1, 6-7 (1992).
16 Liberally construed, plaintiff's allegations state a cognizable § 1983 claim for
17 damages for use of excessive force against correctional officers D. Beatty, B
18 Chavez, E. Hernandez and J. Ruiz, and Sergeant J. Mensing.

19 The other named defendants are dismissed because it is well-established
20 that there is no respondeat superior liability under § 1983, i.e., there is no liability
21 under § 1983 solely because one is responsible for the actions or omissions of
22 another. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

23 C. Request for Appointment of Counsel

24 Plaintiff's request for appointment of counsel (doc # 4) is DENIED for
25 lack of exceptional circumstances. See Terrell v. Brewer, 935 F.2d 1015, 1017
26 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986).

CONCLUSION

For the foregoing reasons and for good cause shown,

1. The clerk shall issue summons and the United States Marshal shall serve, without prepayment of fees, copies of the complaint in this matter, all attachments thereto, and copies of this order on the following defendants at SVSP: D. Beatty, B Chavez, E. Hernandez, J. Ruiz and J. Mensing. The clerk also shall serve a copy of this order on plaintiff.

2. In order to expedite the resolution of this case, the court orders as follows:

a. No later than 90 days from the date of this order, defendants shall file a motion for summary judgment or other dispositive motion. A motion for summary judgment shall be supported by adequate factual documentation and shall conform in all respects to Federal Rule of Civil Procedure 56, and shall include as exhibits all records and incident reports stemming from the events at issue. If defendants are of the opinion that this case cannot be resolved by summary judgment or other dispositive motion, they shall so inform the court prior to the date their motion is due. All papers filed with the court shall be served promptly on plaintiff.

b. Plaintiff's opposition to the dispositive motion shall be filed with the court and served upon defendants no later than 30 days after defendants serve plaintiff with the motion.

c. Plaintiff is advised that a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any

fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradicts the facts shown in the defendant's declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted, your case will be dismissed and there will be no trial. Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc) (App A).

Plaintiff is also advised that a motion to dismiss for failure to exhaust administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your case, albeit without prejudice. You must "develop a record" and present it in your opposition in order to dispute any "factual record" presented by the defendants in their motion to dismiss. Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003).

d. Defendants shall file a reply brief within 15 days of the date on which plaintiff serves them with the opposition.

e. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion unless the court so orders at a later date.

3. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further court order is required before the parties may conduct discovery.

1 4. All communications by plaintiff with the court must be served on
2 defendants, or defendants' counsel once counsel has been designated, by mailing
3 a true copy of the document to defendants or defendants' counsel.

4 5. It is plaintiff's responsibility to prosecute this case. Plaintiff must
5 keep the court and all parties informed of any change of address and must comply
6 with the court's orders in a timely fashion. Failure to do so may result in the
7 dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b).

8 SO ORDERED.

9 DATED: December 24, 2008



CHARLES R. BREYER
United States District Judge